

A LSSC Development Sdn Bhd v Thomas a/l Iruthayam and Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02-407 OF 2005
GOPAL SRI RAM, ZALEHA ZAHARI AND ZAINUN ALI JJCA
14 MARCH 2007

C *Contract — Breach — Termination — Part performance of contract — Whether failure or refusal to perform contract in its entirety by defendant — Whether contract was voidable and plaintiff entitled to terminate it — Whether plaintiff entitled to reverse transaction to status quo ante and claim for restitutio in integrum — Contracts Act 1950 ss 40, 56(1)*

D On 19 June 1996, the defendant (appellant) entered into a sale and purchase agreement with the plaintiffs (respondents) under the terms of which it promised: (1) to sell and transfer a piece of land together with a two-and-a-half storey bungalow which it promised to erect. The price was RM306,000 which the plaintiffs paid in full; (2) that the bungalow would be delivered equipped with water and electricity together with the certificate of fitness issued by the appropriate authority within 24 months from the date of the agreement, ie not later than 18 June 1998; and (3) that if it did not deliver the bungalow within the agreed time, it would pay the plaintiffs liquidated damages calculated on a daily basis at the rate of 10% per annum of the purchase price. The defendant transferred the land to the plaintiff and erected the bungalow, but delivered it beyond the 24 months, and without water or electricity or the certificate of fitness. By a letter dated 21 July 1998, the plaintiffs terminated the agreement. They then took out an originating summons against the defendant. The trial judge granted a declaration that the defendant had breached the terms of the sale and purchase agreement and that the plaintiffs had rightfully rescinded it on 21 July 1998 by reason of the breach and ordered the defendant to refund to the plaintiffs all moneys paid to it. The defendant appealed. Learned counsel for the plaintiffs submitted that the learned judge was entitled to set aside the whole transaction, because, having found that the agreement had been rightfully rescinded, the learned judge had to unravel the transaction and restore the parties to their original position as if the contract had never been made. And this involved the return of the land and house to the defendant through the process of deregistration. **H** The basis for this submission was that the defendant's breach in failing to deliver the house with water, electricity and the certificate of fitness within the specified time rendered the contract voidable by reason of s 56(1) of the Contracts Act 1950 ('the Act'). It was submitted that the plaintiffs had avoided the contract by their letter of termination and were therefore entitled to *restitutio in integrum*.

I

Held, allowing the appeal and entering judgment for the respondents for damages for late delivery and breach of contract:

(1) At common law the right to 'rescind' a contract by way of termination only

arises when there has been a total failure of consideration. Where there is a breach of contract there is no right in an innocent party to reverse the transaction to *status quo ante*; there is only a right to recover damages for breach of contract. The position is no different under the Act (see para 13); *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 followed.

- (2) Given the facts of the present instance, ss 40 and 56(1) should be read together. All that the defendant did not do was to connect the electricity and water and obtain the certificate of fitness. This did not amount to a failure or refusal to perform the contract in its entirety or a failure to do any of the things it had promised. It followed that this was not a case where there was a fundamental breach by the defendant which resulted in the plaintiffs being deprived of substantially the whole benefit which was the intention of the parties that they should obtain from the contract. The contract was therefore not 'voidable' under s 56(1). Hence, the plaintiffs were not entitled to terminate it. Their termination was therefore not lawful. As for the defects, this was something for which they were entitled to be compensated. And as for the delay in delivery, the contract itself contained a clause which provided the formula for the compensation that the defendant must pay for its lateness. This was the clause to which the plaintiffs must have recourse as it created a contractual obligation to pay a single sum by way of liquidated damages for the period during which they were kept out of the building for which they had already paid, such sum being calculated upon the basis set out in the agreement (see paras 15–17).
- (3) The land was in fact transferred and registered in the plaintiffs' name. So there was part performance in that the defendant had done some of the things it had promised to do. Hence there was no total failure of consideration and s 56(1) did not apply here (see para 22); *Tan Yang Loong v Newacres Sdn Bhd* [1992] 1 MLJ 289; *M Concept Sdn Bhd v Berjaya Times Square Sdn Bhd* [2004] 4 MLJ 556 and *Chye Fook v Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308 distinguished.

[Bahasa Malaysia summary]

Pada 19 Jun 1996, defendan (perayu) memasuki satu perjanjian jual beli dengan plaintif (responden) di bawah terma-terma yang dijanjikan: (1) untuk menjual dan memindahkan sebidang tanah bersama-sama dengan sebuah banglo dua setengah tingkat yang dijanjikan untuk didirikan. Harganya adalah RM360,000 yang mana plaintif telah membayar penuh; (2) bangunan tersebut hendaklah diserahkan telah lengkap dengan air dan elektrik bersama-sama dengan sijil layak menduduki yang dikeluarkan oleh pihak berkuasa yang berkenaan dalam tempoh 24 bulan dari tarikh perjanjian, iaitu tidak lewat daripada 18 Jun 1998; dan (3) jika banglo tersebut tidak diserahkan dalam tempoh masa yang dipersetujui, plaintif perlu dibayar ganti rugi jumlah tertentu yang dikira berdasarkan kiraan harian pada kadar 10% setahun daripada harga belian. Defendan telah memindahkan tanah kepada plaintif dan mendirikan banglo tersebut, tetapi menyerahkannya melebihi 24 bulan, dan tanpa air atau elektrik atau sijil layak menduduki. Melalui surat yang bertarikh 21 Julai 1998 plaintif telah membatalkan perjanjian. Kemudian mereka mengeluarkan saman

- A pemula terhadap defendan. Hakim bicara membenarkan deklarasi bahawa defendan telah memungkiri terma-terma perjanjian jual beli dan plaintif telah dengan benar-benar membatalkannya pada 21 Julai 1998 dengan alasan kemungkiran tersebut dan memerintahkan defendan untuk memulangkan kembali kepada plaintif kesemua wang yang dibayar kepadanya. Defendan telah merayu. Peguam plaintif yang
- B bijaksana menghujahkan bahawa hakim yang bijaksana adalah berhak untuk mengenyepikan keseluruhan transaksi, kerana, mendapati bahawa perjanjian telah dengan sebenarnya di batalkan. Hakim yang bijaksana perlu menguraikan transaksi tersebut dan mengembalikan pihak-pihak kepada posisi asal mereka seperti mana perjanjian tidak pernah dibuat. Dan ini melibatkan pemulangan tanah dan rumah kepada defendan melalui proses pembatalan pendaftaran. Asas penghujahan ini
- C adalah, defendan telah mungkir dalam kegagalan menyerahkan rumah dengan air, elektrik dan sijil layak menduduki dalam tempoh yang ditetapkan menyebabkan perjanjian boleh batal dengan alasan s 56(1) Akta Kontrak 1950 ('Akta'). Dihijahkan bahawa plaintif telah mengelak perjanjian tersebut melalui surat pembatalan mereka dan oleh itu berhak kepada *restitutio in integrum*.

D

Diputuskan, membenarkan rayuan dan memasukkan penghakiman bagi responden untuk ganti rugi kelewatan penyerahan dan kemungkiran perjanjian:

- E (1) Dalam Common Law hak untuk 'pembatalan' satu-satu perjanjian melalui penamatan hanya timbul apabila terdapatnya kegagalan balasan yang sepenuhnya. Di mana terdapatnya kemungkiran perjanjian pihak yang tidak bersalah tidak berhak untuk menterbalikkan transaksi kepada status quo ante, hanya terdapatnya hak untuk mendapatkan ganti rugi untuk kemungkiran perjanjian. Posisi ini adalah tidak berbeza di bawah Akta (lihat perenggan 13);
- F *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 diikuti.
- G (2) Berdasarkan fakta keadaan sekarang, ss 40 dan 56(1) mestilah dibaca bersama. Semua yang tidak dilakukan oleh defendan adalah penyambungan elektrik dan air dan mendapatkan sijil layak menduduki. Ini tidak menyebabkan kegagalan dan penafian untuk melaksanakan perjanjian dalam keseluruhannya atau satu kegagalan untuk melakukan perkara yang dijanjikan. Ianya diikuti bahawa ini bukanlah kes di mana kemungkiran asasi oleh defendan yang menyebabkan plaintif dilucutkan sebahagian besar manfaat keseluruhan yang mana ianya adalah tujuan pihak-pihak bahawa mereka perlu dapat daripada perjanjian tersebut. Oleh yang demikian, perjanjian tersebut bukannya 'boleh batal' di bawah s 56(1). Oleh itu, plaintif tidak berhak untuk menamatkannya.
- H Oleh yang demikian penamatan mereka adalah tidak sah. Berkenaan dengan kecacatan, adalah sesuatu yang mana mereka berhak untuk diberi pampasan. Dan berkenaan dengan kelewatan dalam penyerahan, perjanjian itu sendiri mengandungi klausa yang menyediakan formula untuk pampasan yang mana defendan mesti membayar untuk kelewatannya. Ini adalah klausa yang mana
- I plaintif mesti gunakan yang mana ianya membentuk kewajipan kontraktual untuk membayar satu jumlah melalui ganti rugi jumlah tertentu untuk tempoh yang mana mereka dilarang masuk bangunan untuk yang mana mereka telah membayarnya, jumlah tersebut dikira berdasarkan yang dinyatakan di dalam perjanjian (lihat perenggan 15–17).

- (3) Sesungguhnya Tanah telah dipindahkan dan didaftarkan kepada nama plaintiff. Oleh itu terdapatnya sebahagian pelaksanaan yang defendan telah lakukan sebahagian daripada perkara yang dijanjikan untuk dilakukan. Oleh itu tidak terdapatnya kegagalan balasan yang sepenuhnya dan s 56(1) tidak terpakai di sini (lihat perenggan 22); *Tan Yang Loong v Newacres Sdn Bhd* [1992] 1 MLJ 289; *M Concept Sdn Bhd v Berjaya Times Square Sdn Bhd* [2004] 4 MLJ 556 and *Chye Fook v Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308 dibeza.]

Notes

For a case on termination, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2376.

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd [1999] 2 MLJ 500 (refd)
Bowes v Chaleyer [1923] 32 CLR 159 (refd)
Buckand v Farmer [1979] 1 WLR 221 (refd)
Chye Fook v Teh Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308 (distd)
Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 (refd)
Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha [1962] 2 QB 26 (refd)
Johnson v Agnew [1980] AC 367 (refd)
Lim Ah Moi v AMS Periasamy Suppiah Pillay [1997] 3 MLJ 323 (refd)
Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1 (refd)
Longstaff v Birtles [2001] EWCA (Civ) 1219 (refd)
M Concept Sdn Bhd v Berjaya Times Square Sdn Bhd [2004] 4 MLJ 556 (distd)
Mayson v Clouet & Anor [1924] AC 980 (refd)
Moschi v Lep Air Services Ltd [1973] AC 331 (refd)
Philpot v Evans [1839] 151 ER 200 (refd)
Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556 (folld)
Ripley v M'Clure [1849] 154 ER 1245 (refd)
Sargent v ASL Developments Ltd [1974] 131 CLR 634 (refd)
Tan Yang Loong v Newacres Sdn Bhd [1992] 1 MLJ 289 (distd)

Legislation referred to

Contracts Act 1950 ss 40, 56(1)
 Specific Relief Act 1950 ss 34, 35, 36, 37

Appeal from: Originating Summons No MT1(MT2)–21–942 of 1998 (High Court, Shah Alam)

Amarjeet Singh (Artar Singh with him) (Zabeda & Amarjeet) for the appellant.
Joseph Iruthayam (Sharonjit Kaur with him) (Joseph Iruthayam & Co) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This appeal raises a short question. It is this. What are the remedies open to an innocent party where there is a breach of contract? One would have thought that

A this rather basic question had been answered by the courts of England at least by the mid 19th century through the doctrine of repudiation. See, *Philpot v Evans* [1839] 151 ER 200, p 202; *Ripley v M'Clure* [1849] 154 ER 1245, p 1251. Where a promisor wrongfully repudiates a contract in its entirety, the promisee has a choice. He or she may elect to accept the repudiation, treat the contract as at an end and sue for damages. The rationale is that the primary obligation to perform the promise made is substituted with a secondary obligation to compensate the promisee for the breach. See, *Moschi v Lep Air Services Ltd* [1973] AC 331. Alternatively, he or she may elect to reject the repudiation and treat the contract as subsisting. Whether the one or the other course was adopted by the promisee – the innocent party – is a fact that is to be inferred by the court from the objective facts, including the words and conduct of the parties. An election once made is irreversible. See *Sargent v ASL Developments Ltd* [1974] 131 CLR 634, p 655. But it is the essence of the doctrine of repudiation that the breach must go to the root of the contract. See, *Mayson v Clouet & Anor* [1924] AC 980; *Bowes v Chaleyer* [1923] 32 CLR 159; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26.

D [2] Now, there is another way of putting across the doctrine of repudiation. If a promisor does not perform his promise, the promisee may terminate the contract. This right of termination was referred to by the common law lawyers of the 19th Century as a right to rescind. Some lawyers continue to use the word rescind in this sense. Professor GH Treitel is one (see Trietel's *Law of Contract* (11th Ed)). But this 'rescission' is very different from the specific relief of rescission invented by the Court of Chancery. The right to terminate puts an end to the contract only as to the future. All past rights and duties under the contract remain unaffected. But that is not. So in the case of the equitable remedy of rescission, which, when exercised, restores the parties to the same position as though the contract was never made. In other words, there is restitutio in integrum. Where it is impossible to restore the status quo ante, the court may grant equitable compensation. This is what happened in *Longstaff v Birtles* [2001] EWCA (Civ) 1219, a case involving the breach of fiduciary duty.

G [3] But, the common law right to 'rescind' and the equitable remedy of rescission should never be equated. Mark, that one is a right that may or may not be exercised whilst the other is a remedy available in a Court of Equity, and, in our jurisdiction, given statutory force by ss 34 to 37 of the Specific Relief Act 1950. No doubt, there is a very limited right of rescission at common law (*Lim Ah Moi v AMS Periasamy Suppiah Pillay* [1997] 3 MLJ 323) which, on closer examination is actually the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration. See, *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32. A simple example serves to illustrate the common law right to rescind. If I pay you to sell me a ton of wheat and you deliver a ton of maize, I am entitled to return the maize to you and to have the price refunded.

I [4] That there must be a total failure of consideration before the limited common law right to rescind may be exercised is borne out by the following passage at p 502, para 20–007 in *The Law of Restitution* (6th Ed) by Goff & Jones which is the leading text on the subject:

A breach of contract may be so fundamental that it deprives the 'party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings.' [*Hong Kong Fir Shipping Co Ltd v Kawasaki Kaisen Kaisha Ltd* [1962] 2 QB 26]. The innocent party has then an election. He may affirm the contract or he may bring it to an end. In the latter event, if he has paid money to the defendant under the contract, he can, as an alternative to claiming damages, sue for recovery of the money provided that the consideration for the payment has wholly failed; if the consideration has partially failed, his only action is for damages.

[5] Despite the existence of this limited right of rescission at common law, it is best, I think, that the expressions 'rescission' and 'rescind' be avoided when dealing with a case of breach of contract as they may lead to much confusion. In this context I would repeat what was said by this court in *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd* [1999] 2 MLJ 500:

The right of an innocent party to put an end to future obligations under a contract is sometimes referred to as 'the right to rescind' and the act of termination as 'rescission'. This terminology is erroneous and misleading. True rescission is specific relief. It is available to a litigant either as self-help upon satisfaction of certain conditions (see *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525) or as a judicial remedy obtainable in an action. It was invented by the Court of Chancery and now finds its place in Chapter IV of our Specific Relief Act 1950. It has the effect of setting at naught the contract ab initio and not merely as to obligations *de futuro*. It places the parties on a footing as though a contract had never been made. The difference between the so-called 'rescission' which is in truth nothing more than the act of terminating future obligations under a contract and rescission in its true sense is brought out in the following passage in the speech of Lord Wilberforce in *Johnson v Agnew* [1980] AC 367 at pp 392, 393:

At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as 'rescinding' the contract, this so-called 'rescission' is quite different from rescission ab initio, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion.) In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about 'rescission ab initio'.

[6] In *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556, Lord Wilberforce repeated the caveat he had delivered in *Johnson v Agnew* [1980] AC 367:

... when in the context of a breach of contract one speaks of 'termination' what is meant is no more than that the innocent party or, in some cases, both parties are excused from further performance. Damages, in such cases, are then claimed under the contract, so what reason in principle can there be for disregarding what the contract itself says about damages, whether it 'liquidates' them, or limits them, or excludes them? These difficulties arise in part from uncertain or inconsistent terminology. A vast number of expressions are used to describe situations where a breach has been committed by one party of such a character as to entitle the other party to refuse further performance; discharge, rescission, termination, the contract is at an end, or dead, or displaced; clauses cannot survive, or simply go. I have

A come to think that some of these difficulties can be avoided; in particular the use of ‘rescission’, even if distinguished from rescission ab initio, as an equivalent for discharge, ... may lead to confusion in others. To plead for complete uniformity may be to cry for the moon. But what can and ought to be avoided is to make use of these confusions in order to produce a concealed and unreasoned legal innovation ...

B [7] Lord Diplock also deprecated the use of the expressions ‘determination’ and ‘rescission’ to the consequences flowing from a breach going to the root of the contract. He said:

C When there has been a fundamental breach or breach of condition, the coming to an end of the primary obligations of both parties to the contract at the election of the party not in default is often referred to as the ‘determination’ or ‘rescission’ of the contract or, as in the Sale of Goods Act 1893, ‘treating the contract as repudiated’. The first two of these expressions, however, are misleading unless it is borne in mind that for the unperformed primary obligations of the party in default there are substituted by operation of law what I have called the secondary obligations.

D [8] I have spent some time on the law because what the plaintiffs in this case have done is to produce — in the words of Lord Wilberforce — an ‘unreasoned legal innovation’ — through a misinterpretation of the relevant legal principles that are applicable to the particular facts of this case. And those facts are as follows.

E [9] On 19 June 1996, the defendant (appellant before us) entered into a sale and purchase agreement with the plaintiffs (respondents before us) under the terms of which it undertook a number of obligations of which three are of immediate relevance. First, it promised to sell and transfer a piece of land together with a 2½ storied bungalow which it promised to erect. The price was agreed at RM306,000. The plaintiffs paid this in full. They also paid some other charges as required by the defendant. Second, it promised that the bungalow would be delivered equipped with water and electricity together with the certificate of fitness issued by the appropriate authority within 24 months from the date of the agreement, that is to say, not later than 18 June 1998. I must add for completeness that time was expressly made of the essence of the contract by a term of the agreement. Third, it promised that if it did not deliver the bungalow within the agreed time, it would pay the plaintiffs liquidated damages calculated on a daily basis at the rate of 10% per annum of the purchase price which, in this case, works out to RM83 per day.

H [10] The defendant transferred the land to the plaintiff. It did erect the bungalow. But delivered it beyond the 24 months. And without water or electricity or the certificate of fitness. By a letter dated 21 July 1998, the plaintiffs terminated the agreement. They then took out an originating summons in which they claimed the following relief (which I paraphrase):

- I
- (i) a declaration that the defendant had breached the terms of the sale and purchase agreement and that the plaintiffs had terminated it on 21 July 1998;
 - (ii) an alternate declaration that the sale and purchase agreement had terminated due to the breach of contract by the defendant;

- (iii) an order that the defendant pay the plaintiffs damages in the liquidated sum calculated at the rate of 10% per annum over the purchase price of RM306,000 computed from the date on which vacant possession ought to have been delivered, that is, from 18 June 1998 until the agreement had been terminated; A
- (iv) an order that the defendant refund to the plaintiffs all moneys paid to it, that is, the purchase price RM306,000 and other charges amounting to RM2,980; B
- (v) further or alternatively, damages for breach of contract.

There were also prayers for the usual consequential relief. C

[11] After a trial conducted on written evidence, the learned judge in a reserved judgment found for the plaintiff. In respect of the relief claimed, he said this:

- (i) I hereby declare that the defendant had breached the sale and purchase agreement dated 19 June 1996, and the plaintiffs had rightfully rescinded the agreement on 21 July 1998 by reason of that breach; D
- (ii) that the defendant refund the plaintiffs all monies paid to them totalling RM306,000 as the purchase price of the impugned property and incidental charges of RM2,980;
- (iii) interest at the rate of 8% per annum on the judgment sum from the date of the filing of the originating summons to the date of full settlement; E
- (iv) the plaintiffs be deregistered as the registered owners of the impugned property on full and final settlement of the adjudged sum; and
- (v) costs of this application. F

[12] In the course of his argument before us, learned counsel for the plaintiffs sought to support the orders made by the learned judge. He says that the learned judge was entitled to set aside the whole transaction. Because, having found that the agreement had been rightfully rescinded, the learned judge had to unravel the transaction and restore the parties to their original position as if the contract had never been made. And this involved the return of the land and house to the defendant through the process of de-registration. The basis for this submission is that the defendant's breach in failing to deliver the house with water, electricity and the certificate of fitness within the specified time rendered the contract voidable by reason of s 56(1) of the Contracts Act 1950 ('the Act'). The plaintiffs had avoided the contract by their letter of termination and were entitled to *restitutio in integrum*. With respect, I am unable to agree with the plaintiffs' argument. My reasons now follow. G

[13] In the first place, as I have already demonstrated, at common law the right to 'rescind' a contract by way of termination only arises when there has been a total failure of consideration. In the second place, as pointed out by Lords Wilberforce and Diplock in *Photo Production*, where there is a breach of contract there is no right in an innocent party to reverse the transaction to *status quo ante*; there is only a right H

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A to recover damages for breach of contract. In the third place, the position is no different under the Act as I shall now demonstrate by reference to its relevant provisions.

Section 40 is the first provision. This is what it says:

B When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Next is s 56(1) which reads:

C When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

D [14] Notice that s 40 uses the phrase ‘in its entirety’ to describe the extent of the breach. So, the contract breaker must have ‘refused to perform... his promise in its entirety’ before ‘the promisee may put an end to the contract’. This is a reproduction of the common law. To re-call, at common law — ‘Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed.’ See, *Photo Productions*, per Lord Diplock.

F [15] Now I turn to s 56(1). It uses the phrase ‘fails to do any such thing at or before the specified time’ to describe the nature of the breach which would bring a particular fact pattern within it to make a contract voidable. The question, then, in each case must be this: Did the defendant fail to perform every part of his promise? If the answer is ‘No’, then s 56(1) has no application. In my judgment, given the facts of the present instance, ss 40 and 56(1) should be read together. When that is done, the question that arises for determination is whether the instant defendant refused to perform its promise in its entirety by not doing any of the things it promised to do within the time specified by the contract. On the facts that question must receive a negative response.

H [16] Here, the defendant promised to convey the land and house. It did that. All that it did not do is to connect the electricity and water and obtain the certificate of fitness. This did not in my judgment amount to a failure or refusal to perform the contract in its entirety or a failure to do any of the things it had promised. It follows that this is not a case where there was a fundamental breach by the defendant which resulted in the plaintiffs being deprived of — to borrow the words of Lord Diplock in *Photo Productions* — substantially the whole benefit which it was the intention of the parties that they should obtain from the contract. The defendant’s breach did not go to the root of the contract. The contract was therefore not ‘voidable’ under s 56(1). Hence, the plaintiffs were not entitled to terminate it. Their termination was therefore not lawful.

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[17] Of course, the plaintiffs were supplied a defective house out of time. As for the defects, this is something for which they were entitled to be compensated. And as for the delay in delivery, the contract itself contains a clause which provides the formula for the compensation that the defendant must pay for its lateness. This is the clause to which the plaintiffs must have recourse as it created a contractual obligation to pay a single sum by way of liquidated damages for the period during which they were kept out of the building for which they had already paid, such sum being calculated upon the basis set out in the agreement. See, *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1.

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[18] I now turn to the cases relied on by learned counsel for the plaintiffs. First, there is *Tan Yang Loong v Newacres Sdn Bhd* [1992] 1 MLJ 289. In that case, the purchasers had entered into an agreement with the developer under which the latter was to construct and deliver a house with vacant possession within 36 months from the date of the agreement. The purchasers had made several payments to the developer. But the developer never constructed the house. In short, he failed or refused to perform his promise in its entirety within the time limited by the agreement. In fact the house had not even been constructed as at the date when the purchasers' action was tried. Hence, Shankar J had no difficulty in upholding the purchasers' claim for a declaration that they were no longer bound by the agreement and ordering a refund of the sums paid by them. That was a case in which there was a total failure of consideration. Put another way, it was a case in which the developer did not do any of the things it had promised to do within the time specified by the contract. The contract was therefore voidable under s 56(1). But the facts of *Tan Yang Loong* are far removed from the present case. Here there was no refusal to perform the contract in its entirety. A house was delivered. As such there was no failure by the defendant to do any of the things it had promised to do within the time specified by the contract. The breach did not go to the root of the contract and therefore the contract was not voidable under s 56(1).

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[19] Next, there is *M Concept Sdn Bhd v Berjaya Times Square Sdn Bhd* [2004] 4 MLJ 556 the facts of which are, for present purposes, indistinguishable from *Tan Yang Loong*. There too, the parcel contracted for had never been delivered. Hence it is once again readily distinguishable from the present instance because here there was no breach that went to the root of the contract.

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[20] Last, there is *Chye Fook v Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308. In that case, the purchaser entered into an agreement dated 8 August 1984 with the developer under the terms of which the house was to be completed on 7 August 1986, that is to say, 24 months after the date of the agreement. Time was of the essence of the contract. Also, there was a clause which said that 'if the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price'. The building was not completed on the agreed date. The purchaser then wrote to the developer on 19 January 1987 rescinding the agreement because the building had not been delivered within the agreed 24-month period. But the building was finally completed in May 1987 and the certificate of fitness was issued on 9 December 1987.

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A The purchaser successfully brought an action for rescission. When giving judgment, Abdul Malek J (as he then was) referred to *Mayson v Clouet & Anor* where Lord Dunedin said this:

B If one party to a contract commits a breach then if that breach is something that goes to the root of the contract, the other party has his option. He may still treat the contract as existing and sue for specific performance; or he may elect to hold the contract as at an end, that is, no longer binding on him — while retaining the right to sue for damages in respect of the breach committed.

C [21] Having cited other authorities, including *Johnson v Agnew* and *Photo Productions*, the learned judge said this:

D There was no evidence as to what stage of building progress the building was at the completion date but from the photographs taken in July 1987, only the plaintiffs' house had been built out of a row of terrace houses and also no other houses could be seen in the area. Since, from the photographs, the plaintiffs' house appears to be the only house built in the area, it is possible that the construction could have even begun after the completion date. That, however, is of secondary importance. What is relevant here is that the plaintiffs had entered into a sale and purchase agreement with the defendants to buy the house and had expected to move into the house two years later. They certainly would have made the necessary preparations for this event and any change in plans would have caused them a great deal of inconvenience and expense. Therefore, if the house was not completed on the appointed date and in fact had not been completed even five months thereafter when the notice to terminate was sent to the defendants and was only completed nine months later and the certificate of fitness issued 16 months after the appointed date, the court is of the view that it is within the right of the purchaser plaintiffs to rescind the contract with the defendants based on legal principles and case law.

F [22] In my respectful view the learned judge in that case fell into error in equating the right to terminate for a fundamental breach of contract ie, a breach going to the root of the contract on the one hand with the equitable remedy of rescission on the other. But the decision is nevertheless correct on its peculiar facts because as may be seen from the judgment, that was a case in which, at the material time the building had not even been constructed. So, as at the date on which the purchaser was to have the house, it had not even been built. Hence that was a case which fell within s 56(1) of the Act because at the material time, the developer had not done any of the things it had promised to do within the time specified by the contract. But in the case before us the facts are very different. Here, the land was in fact transferred and registered in the plaintiffs' name. So there was part performance in that the defendant had done some of the things it had promised to do. Hence there was no total failure of consideration and s 56(1) does not apply here.

I [23] There is one other authority which counsel drew to our attention. It is *Buckland v Farmer* [1979] 1 WLR 221. It was decided after *Johnson v Agnew* had been decided by the Court of Appeal but before the Delphic pronouncements of Lord Wilberforce in the House of Lords in that case and in *Photo Productions* had been handed down. From my reading of that case, there is nothing in the judgment of Buckley LJ that supports the instant plaintiffs. All that the learned Lord Justice said at p 233 of the report was that the court there found it unnecessary to go into the

question whether an innocent party faced with a breach of contract may rescind the transaction *ab initio*. That such a thing cannot be done was most strongly affirmed by the House of Lords in *Johnson v Agnew*.

[24] For the reasons already given I am unable to agree with the decision of the High Court. I would therefore allow the appeal. The declaration and all other orders are set aside. In their place I would enter judgment for the plaintiffs for damages for late delivery and for breach of contract. These shall be assessed by the senior assistant registrar of the High Court to whom this matter is forthwith remitted. In view of the fact that this is an old case, I would, subject to convenience of counsel, fix a very early date for the suit to be mentioned before the senior assistant registrar with a direction to fix an early date for the hearing of the assessment. The appellant/defendant shall have of its costs here and in the court below. The deposit is to be refunded to it.

[25] My learned sisters, Zaleha Zahari and Zainun Ali, JJCA have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed and judgment entered for the respondents for damages for late delivery and breach of contract.

Reported by Loo Lai Mee

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